United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
MARILYN R. WALTER

75-7646

United States Court of Appeals

FOR THE SECOND CIRCUIT

75-7646
75-7668, 75-6132, 75-6140

B

GEORGE RIOS, *et al.*,
Plaintiffs-Appellants,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A., *et al.*,
Defendants-Appellees.

P/S

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

—against—

ENTERPRISE ASSOCIATION STEAMFITTERS
LOCAL 638 OF U.A., *et al.*,
Defendants-Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS GEORGE RIOS, *ET AL.*

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I. ARGUMENT

1. Introduction

In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court held that:

> "[G]iven a finding of unlawful discrimination back pay should be denied only for reasons which if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."
> 422 U.S. at 421

Applying this standard the Court specifically held that a defendant's good faith is no defense to liability for back pay:

> ". . . a worker's injury is no less real simply because his employer did not inflict it in 'bad faith'. Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.'"
> 422 U.S. at 422-23

Each of the defendants below, in their briefs in this Court, devote considerable energy to attempting to ignore, avoid, or obscure the clear standard announced by the Court in Moody and the specific rejection of the good

faith defense. Each attempts to emphasize that back pay is equitable and therefore discretionary, and to ignore the Court's holding that the purpose of vesting the back pay authority in equity was "not to limit appellate review, or to invite inconsistency or caprice, but rather to make possible the 'fashion[ing] of the most complete relief possible.'" 422 U.S. at 421. Thus the district court's equitable discretion must be exercised affirmatively and in accordance with the standard first quoted above, a matter already recognized by this Court in EEOC v. Local 638 . . . Local 28 of the Sheet Metal Workers' International Association, ___ F.2d ___, 11 E.P.D. ¶10,757 (2nd Cir. 1976):

> "The Supreme Court has made clear that back pay is to be the rule rather than the exception under Title VII and that back pay is to be awarded whenever possible so as to deter Title VII violations and so as to 'make whole' the victims of past discrimination."
> 11 E.P.D. at p. 7182

2. Back Pay Should Be Awarded Against The JAC

The JAC persists in the argument that its "good faith" warranted a denial of back pay to those persons injured by its discriminatory practices, since it did not intentionally discriminate (JAC Brief at 16-19). The contention is refuted by the decision in Moody. However, the JAC now

attempts to augment the argument with the equally erroneous contention that §706(g) of Title VII, 42 U.S.C. §2000e-5(g), requires a finding that the defendant engaged in intentional discrimination before back pay can be awarded (JAC Brief at 16). It has been repeatedly held, however, that the statutory use of the term "intentional" does not contemplate or require specific or invidious intent to discriminate. The law is not concerned with "good intent or the absence of discriminatory intent. . .;" rather "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. at 432 (1971); accord, Albemarle Paper Co. v. Moody, supra, 422 U.S. at 422. All that is meant by the term "intentionally" in §706(g) is that the "employment practice was not accidental." Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 996 (5th Cir. 1969).* Regardless of the intentions of the JAC (and plaintiffs submit that they were not in good faith, see Brief for Plaintiffs-Appellants George Rios, et al. [hereafter "Rios Brief"] at 24-27), the discriminatory consequences of the tests adopted by the JAC are indisputable, were felt by a substantial number of black and Spanish-surnamed applicants to the apprenticeship program,** and were

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* Accord Kober v. Westinghouse Electric Corp., 480 F.2d 240, 245-46 (3rd Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791, 796-97 (4th Cir.), appeal dismissed pursuant to Rule 60, 404 U.S. 1006 (1971); Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1201 (7th Cir.), cert. denied, 404 U.S. 991 (1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971).

** 89.63% of the blacks, 88.99% of the Spanish-surnamed failed the tests (A-619-20).

not related to successful job performance either of a steamfitting apprentice or of a steamfitting journeyman (A-607, 918). That these tests were of a standardized type widely used (JAC Brief at 17) is of little consolation to the non-whites who because of it lost the opportunity to become apprentices during a period of full employment and high wages. Nor was this considered relevant by the Supreme Court in holding unlawful the Bennett Mechanical Comprehension and Worderlic Personnel tests, Griggs v. Duke Power Co., supra, 401 U.S. at 436, or the Beta Examination and Worderlic Test in Albemarle Paper Co. v. Moody, supra, 422 U.S. at 436.

There is no evidence of "good faith" in the registration of the apprenticeship program with the state and federal departments of labor. The registration does not purport to validate or immunize the selection procedures and, indeed, the registration agency gave the JAC ample warning of that fact. (see Rios Brief, pp. 26-27) If such registration were accepted as a defense there would be hardly an apprenticeship program that need be concerned with Title VII compliance since most if not all are so registered. This result would hardly serve the central purposes of Title VII.

The district court's denial of back pay to persons discriminated against by the apprenticeship program because of the JAC's alleged good faith is erroneous in law and equity and, though unnecessary for this Court's disposition, in fact.*

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* An additional ground urged by the JAC in support of the Court's denial of back pay against it is discussed at pp. 19-20, below.

3. The MCA And Union Are Liable For Back Pay Awarded Against The JAC

The district court found that "[p]ursuant to a 1960 Declaration of Trust, the Steamfitters Industry Educational Fund was created, with a Board of Trustees, four of whom are chosen by Local 638 and four by MCA. The trustees appoint JAC, a joint labor-management committee of eight members." (A-589) The court further found that "MCA is equally represented with Local 638 on JAC, which administers the industry's apprenticeship program," a finding which formed one of the court's grounds for denying MCA's motion to dismiss. (A-614) While the district court may not have found explicitly that the "joint labor-management committee," which it found the JAC to be, was indeed jointly "controlled" by labor, the Union, and management, the MCA, the findings certainly imply and support that obvious fact, as does an abundance of evidence in the record.

Moreover, in addition to control via the appointment and termination of trustees and authority over the terms of the trust, (see Rios Brief p. 14) the Union and the MCA exercised active and complete control over the apprenticeship program directly through the Joint Apprenticeship Committee. The Secretary of the MCA, who is also an MCA trustee of the Educational Fund, and a regular participant though not a formal member of the JAC since 1963, testified that all matters regarding the requirements for and content of the apprenticeship program were "committed solely" to the JAC and did not require approval by the trustees. [Index to Record on Appeal,

Exhibit 169, Deposition of Joseph L. Hopkins, p. 47]* That this was in fact the case is also quite evident from the minutes of the meetings of the JAC from 1965 to 1972 (Ex. 101), which contain no indication that the Committee did not act autonomously.

Also evident from witnesses' testimony and the minutes of the JAC is the fact that the members of the Committee, in exercising autonomous control over the program, were directly representing and acting for their respective constituent bodies, the Union and the MCA.** Thus, the Secretary of the MCA testified that MCA representatives on the JAC implement the policy of the MCA and "are speaking for the association" at JAC meetings.*** (A-493) Similarly, the Union representatives on the JAC, Messrs. Murray, Tracey, Mulligan, Daly, were the Union's President, Business Agent at Large, Secretary-Treasurer and a Business Agent, respectively. (A-1192; JAC Answers to Interrogatories, Doc. 24, p. 2; Ex. 101, JAC minutes of September 22, 1967, p. 2). And appointments to the Committee, while perhaps formally the prerogative of the trustees, were in fact made directly by the principals involved. (A-773)

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* Hereafter references to Plaintiffs Exhibits admitted into evidence in the district court will be in the form "Ex. ___." References to documents assigned a document number in the Index to the Record on Appeal in the Rios case will be in the form "Doc. ___."

** Indeed, the minutes of the JAC meetings note the appearances of the members of the Committee at each meeting under the respective headings; "Union Representatives" and "Employer Representatives."

*** Indeed, the particular point to which the witness was testifying in this regard was the MCA's involvement in the decision of the Joint Committee to institute the very apprenticeship examination which the district court held unlawful. (A-493-94)

Thus the minutes of the JAC of September 27, 1967, reflect that "[i]t was stated that the Employer's Association will in the near future appoint a new committee member to replace Mr. Olvany and will notify the Apprenticeship Committee accordingly." (Ex. 101, JAC Minutes, September 27, 1967, p. 2)*

In the Committee's actual administration of the apprenticeship program the minutes of the JAC meetings clearly indicate that the representatives were acting on behalf of their respective principals, the Union and the MCA. Indeed, some matters, such as the number of apprentices to be indentured, were negotiated between the Union and the MCA not only through their JAC representatives,** but also between their representatives in collective bargaining (A-181).

Union members of the JAC were represented by the Union's attorneys, and MCA members by MCA attorneys. Thus at its meeting of September 22, 1967, the Committee reviewed a draft copy of the Equal Employment Opportunity Information Report Form EEO-2, which is required of joint labor-management apprenticeship committees by

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* At the next meeting the Chairman of the Committee introduced two "new members of the Apprenticeship Committee: Mr. Bernard Reisman, Representative for the Employer and Mr. William J. Daly, Representative for the Union." (Ex. 101, JAC Minutes of March 7, 1968, p. 1) Similarly, communications from the Secretary of the MCA reflected in the minutes of June 11, 1970, and May 22, 1972, notified the Committee of the resignation of employer representatives and of the appointment of their replacements (Ex. 101, JAC Minutes of June 11, 1970, p. 2; JAC Minutes of May 22, 1972, p. 1)

** See Ex. 101, JAC Minutes of August 7, 1969, p. 3; JAC Minutes of November 13, 1969, p. 3.

§709(c) of the Title VII, 42 U.S.C. §2000e-8(c). "It was agreed [by the Committee] that copies be forwarded to the Counselors who represent Management and Labor for final approval and mailed according to their directive."* (Ex. 101, JAC Minutes of September 22, 1967, p. 1-2).

The Union and the MCA now argue that they did not control their joint apprenticeship committee. Fancifully they deny that there is any evidence of their control. It is also suggested that since neither body had a majority of the trustees or members of the JAC, neither could be said to control or be liable for the operation of the program. The simple answer, of course, lies in the nature of their joint activity. They controlled jointly and are jointly liable. Indeed, while the minutes of the meetings reflect divisions between the Union and the MCA on some matters, there was one on which unanimity was only too evident. In the context of a 1965 discussion by the JAC of the feasibility of obtaining a new school facility from the Board of Education, and the expressed concern that the Board would want to control the program, a motion to further explore the possibility was carried by the Committee following the telling remarks of the Secretary of the MCA:

> "We need not lose control, we could still maintain control -- outline a program which would be acceptable to the United Association and us."
> (Ex. 101, JAC Minutes, May 18, 1965, p.5)

The Union and the MCA did indeed maintain control and are liable

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* Similarly in this proceeding, at least until it reached this Court on the instant appeal, counsel for the Union appeared on behalf of "Defendants Local 638 and the union members of the JAC," and counsel for MCA on behalf of "Defendants MCA and the employer members of the JAC." (A 581)

for the consequences.

4. The MCA Is Liable For Back Pay Awarded To Journeyman Members Of The Class

The thrust of the MCA's defense to the contention (Rios Brief at 34-38) that it is jointly liable for the systemic pattern of racial discrimination in the steamfitting industry, is that it is not itself an employer, and it was not responsible for discriminatory practices of the Union. In point of fact, however, the district court held that MCA is an "employer" within the meaning of Title VII (A-614), basing this conclusion on the facts that

> "MCA, as a trade association for purposes of unified collective bargaining, performs the function of an agent for its member contractors. In addition, MCA is equally represented with Local 638 on JAC, which administers the industry's apprenticeship program. MCA members employ the major share of the steamfitter work force in New York City and Nassau and Suffolk Counties, and the terms of the collective bargaining agreement negotiated between MCA and Local 638 prevail throughout the industry. Though there is no hiring hall for steamfitters in the New York area, there is sufficient uniformity of employment conditions, at least with respect to the employment of nonwhites, to support the conclusion that MCA is a proper party defendant in the Rios action."
> (A-614-15)

In its involvement in the steamfitting industry, MCA participated in the "accepted practice in the steamfitting industry generally that employment of steamfitters was limited to members of Local 638 or non-members who had a permit from Local 638." See MCA Brief at 4. Because of this "accepted practice" there existed

> "a pattern of long-continued and egregious racial discrimination which permeated the steamfitting industry, . . ." Rios v. Enterprise Ass'n Steamfitters Local 638, supra, 501 F.2d at 622, 631 (2nd Cir. 1974)

Where a systemic pattern of discrimination exists, an organization which more than any individual employer has "influence over and responsibility for employment practices applying to the industry as a whole", (A-616) is equally liable for that discrimination along with the Union with which it establishes the terms and conditions of employment. Given its capacity as bargaining agent for the employers and its consequent control over the industry, such efforts as MCA may have made to correct the situation (see MCA Brief at 4-5) cannot shield it from liability for the continuing discriminatory practices. Trans Union (UTU), Local 974 v. Norfolk and Western Rwy. Co., ___ F.2d ___, 10 E.P.D. ¶10,398 (4th Cir. 1975).*

Courts have found an affirmative obligation on the part of all participants in a discriminatory employment situation to eradicate that discrimination.

> "Title VII requires that both union and employer represent and protect the best interests of minority employees." Robinson v. Lorillard Corp., supra, 444 F.2d at 799

Even if MCA's involvement in the discrimination was less direct than that of the Union, its participation is nonetheless sufficient

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* "Even if [the company] did offer to dovetail seniority rosters in 1968, the fact is that dovetailing was not accomplished. Mere bona fides on the part of an employer, not translated into actual eradication of discrimination, provides no defense to a claim for back pay".
10 E.P.D. at p. 5726

Nor are the factors cited by MCA to justify its freedom from liability persuasive (MCA Brief at 4-5, 9). They are simply attempts to show it acted in good faith, a matter irrelevant to its liability for back pay, see supra, pp. 1-4.

to hold it for back pay. In Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975), petition for cert. filed sub nom. Teamsters, Local 988 v. Sabala, 44 U.S.L.W. 3384-85 (U.S. December 1, 1975) (No. 75-781) a union was held liable for back pay along with an employer for a discriminatory seniority provision in a collective bargaining agreement, even though it had delegated the authority to negotiate the contract to a National Bargaining Committee and had actively petitioned the National Committee to merge the separate seniority systems. The Court of Appeals reasoned that the union, having received the economic benefits of the collective bargaining agreement, could not disclaim responsibility for the discrimination which it contained. 516 F.2d at 1263. Similarly, in Patterson v. American Tobacco Co., supra 11 E.P.D. ¶10,728 at 7019-20, the Fourth Circuit held an international union liable for back pay, based solely on the facts that the international advised the local union during the contract negotiations and pursuant to its constitution had the power of approval over all local agreements. See, also, EEOC v. Detroit Edison Co., 515 F.2d 301, 314 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3214 (U.S. September 12, 1975) (No. 75-393) (a union could not "passively accept" a discriminatory seniority system and then escape liability for back pay); Robinson v. Lorillard Corp., supra, 444 F.2d at 799 ("union pressure" was no defense to a company's liability where it had acceded to a discriminatory contract provision); cf., Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 989 (D.C. Cir. 1973).

More than the defendants in the cases cited above, MCA was directly and extensively involved in the discriminatory practices in the steamfitting industry (see, supra p. 9 and Rios Brief at 17-19, 34-37). Consequently, MCA, along with the Union is liable for the loss of employment suffered by minority journeymen as a result of the discriminatory practices in the industry.*

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* As to the NLRA case cited by MCA, Confectionary & Tobacco Drivers & Warehousemen's Union v. NLRB, 312 F.2d 108 (2d Cir. 1963), (MCA Brief at 20) the Court's finding that on the facts of the case the employer was liable to some of the employees for back pay and not to others merely indicates that decisions of liability are based on the facts involved. And on the facts of this case, MCA has joint responsibility for the discrimination in the steamfitting industry and is accordingly liable for back pay.

5. Lack of Funds Is Not A Defense To Back Pay Liability

A. The Union's Argument

The district court's order provided for a possible pro-rata reduction of back pay awards, upon their determination, in consideration of the Union's financial resources (A-799-80 [Order]), a provision from which the Rios appellants have appealed (see Rios Brief at 42-45). The Union has appealed from the district court's limited award of back pay, arguing that its financial resources coupled with other factors not credited in the district court's decision, warrant denial of any and all back pay (Union Brief at 17-30), or in the alternative support the pro-rata reduction provision of the district court's order (Union Brief at 31-41). In their totality the Union's arguments amount to a claim for special treatment for unions and special immunity for the discriminatory practices in which they engage. The claim to special treatment, however, has no support in equity or law. The claim of financial exigency has no support in evidence.

There is nothing in the nature of this Union which merits special treatment under Title VII. The Union, as the district court observed, is like other unions "an association of workers united for their mutual protection." (A-772) By virtue of their organization

the workers can obtain higher wages. A portion of those wages is paid in dues to the Union in order that it can further promote their common interests. The workers select the Union, elect its officers, are ultimately responsible for its policies. When the policies of the Union result in the exclusion of minorities from membership and access to the employment opportunities which the Union controls, the "mutual protection" in which the members have engaged, intentionally or not, assumes a somewhat different character. The result is in every relevant respect comparable to discrimination by an employer, the only material difference being that the Union's discrimination is necessarily more profitable.

An employer's exclusion of minorities from its work force may or may not yield a financial return in maximized profits. A Union's exclusion of minorities from labor supply necessarily maximizes the profits realized as wages and access to employment enjoyed by the members of the Union. A part of the profits produced by the discrimination is paid back into the Union in dues with the result, among others, of further maintaining the organized exclusion of minorities from the protected employment. These are the "financial resources" of the Union, previously devoted to maintaining discriminatory barriers, now to be used to make the victims of that discrimination whole. There is certainly no inherent equity or logic in the proposition that members who have benefited from a Union's discriminatory practices should bear less of the burden of making the victims whole than should the remote customers of a discriminating employer.

Particularly significant in this regard is the Supreme

Court's recent explanation in Franks v. Bowman Transportation Co., ___ U.S.___, 44 U.S.L.W. 4356 (1976), of the necessity of retroactive seniority to accomplish the dual purposes of Title VII, even if the relief conflicts with the economic interests of other employees:

> "[D]enial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central 'make-whole' objective of Title VII. These conflicting interests of other employees will of course always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy. But, as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination, and the experience under its remedial model in the National Labor Relations Act points to the contrary. Accordingly, we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected." (Footnote omitted)
>
> 44 U.S.L.W. at 4364.

Consideration of financial resources of the perpetrator of the discrimination, as appellants' previous brief discussed (Rios Brief at 42-45), cannot be reconciled with the principle established in Albemarle Paper Co. v. Moody, supra. Such a defense is a Pandora's box, and the Union has no special claim to the key. An employer may as easily argue that the cost of an award, even with its option to pass it on to its customers, would render it uncompetitive and force it out of business, thus eliminating the very jobs to which the minority group seeks access (while the Union can claim only that the minority group would suffer the somewhat dubious loss of its services).

Clearly, general acceptance of such a defense would "frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 421. If equity dictates an accommodation of financial exigency where the violator can indeed prove the fact, this can be done by provision for installment payments over a period of time. But the Supreme Court's decisions in Moody and Franks lead inevitably to the conclusion that an accommodation should not be at the further expense of those persons already injured by the unlawful practices of the defendants.

Thus, there is no authority in the case law for treating unions with special consideration. Courts have awarded back pay solely against unions, though other defendants were named in the suit, where the unions were primarily responsible for the discrimination. Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974); United States v. Wood, Wire & Metal Lathers, Local 46, 328 F.Supp. 429 (S.D.N.Y. 1972); cf. Kaplan v. Local 659, Stage Employees, 525 F.2d 1354 (9th Cir. 1975). And where unions have been assessed back pay liability along with employers, the courts have not reduced the union's share where the company had far greater financial resources, but have assessed liability based on responsibility for the illegal discrimination. Russell v. American Tobacco Co., supra; Transportation Union (UTU), Local 974 v. Norfolk & Western Ry. Co., ___ F.2d ___, 10 E.P.D. ¶10,398 (4th Cir. 1975); Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974),

petition for cert. filed, 43 U.S.L.W. 3639 (U.S. April 25, 1975) (No. 74-1350); Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372 (5th Cir. 1974). See also cases discussed in Rios Brief at 42-45.

Nor is there any policy under the National Labor Relations Act which provides special treatment for unions as institutions for purposes of back pay awards.* The Supreme Court in Radio Officers Union v. NLRB, 347 U.S. 17 (1954) rejected the argument of a union that it would not effectuate the policies of the Act and indeed would frustrate the Act's purposes to hold it liable for back pay if the employer were not made to share the burden. The Court held that

> "The purpose of Congress in enacting [Section 10(c)] was not to limit the power of the Board to order back pay without ordering reinstatement but was to give the Board power to remedy union unfair labor practices comparable to the power it possessed to remedy unfair labor practices by employers." 347 U.S. at 54-55 (footnote omitted)

Beyond the lack of equity in the Union's arguments and the clear conflict with the principles of Moody, their is simply no evidence of the Union's financial situation to support the dire predictions which it raises. There is certainly no evidence to support the repeated claim that a back pay award will destroy the Union or the affirmative action program which it is enjoined to undertake, and no

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* NLRB v. Oil, Chemical and Atomic Workers, 476 F.2d 1031 (1st Cir. 1973) and other NLRA cases cited by the Union (Union Brief at 28) support the proposition that in cases of picket line misconduct, damages are the appropriate remedy, and this relief is not within the authority or expertise of the NLRB. See, Long Construction Co., 145 N.L.R.B. 554 (1963); Colonial Hardwood Flooring Co., Inc., 84 N.L.R.B. 563 (1949). They provide no support for a denial or reduction of awards of back pay against unions based on their financial resources.

reason why a reasonable installment payment scheme, if that is necessary, would not fully accommodate any unusual difficulties.*

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* The Union's argument that, at present, affording membership in the Union and consequent employment is sufficient relief for those whom it has deprived of those opportunities in the past is plainly frivilous. This proposal, like acceptance of the good faith defense, "would read the 'make whole' purpose right out of Title VII." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 422.

B. The JAC's Argument

The grounds for the district court's denial of back pay against the JAC were that the losses suffered as a result of the apprenticeship program were "speculative and equitable considerations weigh against making these back pay awards since the admission tests used by defendants were registered with the United States and New York State Departments of Labor and were adopted by defendants in good faith on the recommendation of experts." (A-771) Evidently recognizing the inevitable reversal of the decision on these grounds in light of Albemarle Paper Co. v. Moody, supra, and this Court's decision in EEOC v. Local 638 ... Sheet Metal Workers, Local 28, supra, (see pp. 1-4), the JAC attempts to support the denial on a ground not credited by the district court: that the financial burden of an award would preclude the JAC's implementation of the affirmative action plan. (JAC Brief at 19-22) This argument, while lacking merit and evidentiary support in any event, must be rejected in accordance with the Supreme Court's recent ruling on a comparable argument in Franks v. Bowman Transportation Co., ___ U.S. ___, 44 U.S.L.W. 4356, 4364 (U.S. March 24, 1976)(No. 74-728).

> "We reject this argument for two reasons. First, the District Court made no mention of such considerations in its order denying the seniority relief. As we noted in Albemarle Paper, supra, at 421 n. 14, if the District Court declines due to the peculiar circumstances of the particular case to award relief generally appropriate under Title VII, '[i]t is necessary . . . that . . . it carefully articulate its reasons' for so doing."

Secondly, the JAC's contention of financial exigency is, like the Union's, totally lacking in evidentiary support or reason why installment payments would not reasonably accommodate any unusual difficulties that could be proved. Nor is there any more reason to accord a joint union-employer committee a special immunity from back pay liability than there is to afford such special treatment to a union or an employer alone. (See pp. 13-18)

Finally, as a practical though legally irrelevant matter, the JAC does not bear this liability alone. The Union and the MCA are also liable for the discriminatory operation of the apprenticeship program. (See pp. 4-8)

6. All Members Of The Class Who Sought And Were Discriminatorily Denied Apprenticeship, Union Membership And Work Referrals Are Entitled to Back Pay

The district court herein denied back pay to three categories of plaintiffs for a similar though variously stated reason. Thus, the damages sustained by victims of discrimination in the apprenticeship program were held to be "speculative." Victims of the discriminatory job referral practices were denied the relief on the sole ground that the resulting damages were "not ascertainable since Local 638 had no hiring hall and there are no accurate records of job openings for the period involved." Victims of discrimination in admission to journeyman membership in the A branch of the Union who did not make formal written application to the A branch were denied the relief on the sole ground that their damages were "hypothetical" (A-770). The latter group included both journeymen who had verbally sought admission to the Union, and those who had not applied due to the Union's reputation for discrimination. The Rios appellants earlier brief discussed in full the error in this treatment of the claims of the various members of the class. (Rios Brief at 28-33) The JAC has argued in support of the denial to apprentice applicants (JAC Brief at 14-16), and the Union in support of the denial to journeymen (Union Brief at 42-45).

The recent decision of this Court in the virtually identical situation presented in EEOC v. Local 638, Local 28, Sheet Metal Workers, 11 E.P.D. ¶10,757 (2d Cir. 1976), has resolved

the issue. There the Court held:

> "In the instant setting, a denial of back pay to those persons who possess only testimonial evidence of their application and rejection would serve to 'frustrate the central statutory purposes' of Title VII. One of the reasons that applicants may have no documentary proof of discrimination against them is that Local 28 and the JAC have kept incomplete records of their admission practices. To deny back pay to persons who, as a result of the union's actions, have no written proof is to reward the union and the JAC for their record-keeping failures.
>
> Beyond that consideration, back pay should be given as broadly as possible in order to effectuate the dual policies of remediation and deterrence. There is a class of individuals whose claims are too speculative for adjudication: those with neither written nor testimonial evidence of application and rejection. Thus, those who never applied to Local 28 or the JAC because of their well-deserved reputation for discrimination are, regrettably, ineligible for back pay. But those who did apply and who can prove discrimination by written or testimonial evidence are entitled to back pay." (footnote omitted) (emphasis in original)
> 11 E.P.D. at pp. 7182-83

While the Court affirmed the denial of back pay to those deterred from applying, a result with which the Rios appellants disagree for the reasons stated in their earlier brief (Rios Brief at 32), it is recognized that the decision is controlling on this as well as the other issues on this point. Under this Court's decision, therefore, the lower court's denial of back pay to apprentice applicants and journeymen with only testimonial evidence of their efforts to gain employment and/or union membership must be re-

versed.*

All other arguments of the JAC and the Union as to questions of certainty of proof are answered by appellants' earlier brief (Rios Brief at 28-33), this Court's decision in Sheet Metal Workers, and by the Supreme Court's recent decision in Franks v. Bowman Transportation Co., ___ U.S. ___, 44 U.S.L.W. 3456 (U.S. March 24, 1976)(No. 74-728). The members of the class must be afforded an opportunity to prove through written or testimonial evidence that they sought and were discriminatorily denied apprenticeship, employment referral or union membership. Any arguments by the JAC or the Union as to uncertainty that an individual would have remained in the apprenticeship program or earned the wages earned by a comparable white worker are answered by the Supreme Court in Franks v. Bowman Transportation Co., supra:

> "No reason appears, however, why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue."
> 44 U.S.L.W. at 4363, n. 32.

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* Indeed the district court's decision denying back pay in Sheet Metal Workers, 401 F.Supp. 467, 490-491 (S.D.N.Y. 1975), relied largely on Judge Bonsal's reasoning herein. Thus, the district court in Sheet Metal Workers denied back pay to persons discriminated against by the joint apprenticeship program on the grounds that their damages were "highly speculative;" denied the award to journeymen who had not made written application for admission to the Union on the ground that their claim would "at best be hypothetical;" and denied it to those who had been deterred from applying for admission to the Union on the ground that their damages were not "ascertainable." 401 F.Supp. at 491.

7. Certain Standards Adopted By The Court In Awarding Back Pay Were Erroneous

The district court erred in establishing the date of its post trial order as the latest date for which back pay could be claimed. (A-775) While on June 21, 1973 the district court did enjoin any further acts of discrimination, it was not until many months later that all of the non-whites were able to avail themselves of the procedures for admission into the A Branch established by that order.* Recently, the Fourth Circuit determined that to satisfy the requirements of Moody

> " . . . back pay must be allowed an employee from the time he is unlawfully denied a promotion, subject to the applicable statute of limitations, until he actually receives it." Patterson v. American Tobacco Co., supra, 11 E.P.D. at 7018 (Emphasis added)

Where there was no vacant position available (a situation not present in this case), a supplemental award was ordered equal to the present value of lost earnings likely to occur between the date of the court's judgment and the time when the employee could assume his new position. See also, White v. Carolina Paperboard Corp., __ F.Supp. ___, 10 E.P.D. ¶10,470 at 6018 (W.D.N.C. 1975); Rogers v. EEOC, 403 F.Supp. 1240, 1242 (D.D.C. 1975). It is the date that a qualified non-white is admitted to the A Branch that discrimination in admission against him as an individual ceases. A truncated award of back pay

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* Administering of the practical examination to non-whites continued up to February, 1974 (Sheeran Affidavit, Doc. 84, p. 3).

cannot make the victim of discrimination whole.

Nor was the district court correct in providing that discrimination against a class member for purposes of back pay would not be deemed to begin until the next white person was accepted into the A Branch. (A-774-75) McDonnell Douglas v. Green, supra, 411 U.S. at 802 cited in the Union Brief at 46, requires only that a plaintiff prove:

> " . . . after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802

And although the actual admission of a similarly situated white may be conclusive proof that the reason for failure to admit the class member was racially motivated, it does not follow that the discrimination only occurred at the time of admission of the white. If whites were admitted at or about the time they applied, the date of application of the class member is the point at which discrimination must be deemed to occur.

The district court found that there were no non-whites among the 3549 members of the A Branch in 1966 (A-587), that from 1967 to 1971 the membership of the A Branch increased to 3850 persons only 31 of whom were non-white (A-587), most of whom were admitted following civil rights proceedings (Rios Brief at 9), and that in 1972, a year in which no non-whites were admitted other than pursuant to court order, 156 white persons were admitted to the A Branch without having taken a written or practical test, and 36 white persons were admitted to the A Branch through the apprenticeship program. (A-599) Given this pattern of discrimination (A-600-01) and the extensive testimony

of the fruitless efforts of non-whites to become members of the A Branch (e.g., A-128-29, 131-32, 189-91, 199-200, 201-2, 203-4, 206-8, 209-10), it is completely inappropriate to require further proof that whites were consistently admitted into the A Branch and non-whites were consistently being discriminatorily denied admission at the time that they applied.

It was also incorrect for the district court to require that any public assistance received by a claimant be deducted from the back pay awarded. Under New York State Law the Department of Labor is empowered to recover the amount of unemployment benefits paid to an individual who subsequently receives a retroactive payment of remuneration. N.Y. Labor Law §§597.3, 597.4. (McKinney 1965). Back pay is considered to be wages and therefore may be recouped by the state. Talkov v. Catherwood, 33 App.Div. 2d 1084, 307 N.Y.S. 2d 809 (Third Dept. 1970). Under the district court's provision, it is conceivable that a claimant could have an amount received as public assistance deducted twice: once by the court on behalf of the employer; and once by the public agency to which it is truly owed, and which may recoup it--a result clearly contrary to the principles of Moody.

Finally, as discussed in the Rios Brief at 50-51, there is no logic in requiring a claimant to have resided in a county within the Union's jurisdiction at the time he applied to the A Branch. Contrary to the Union's assertion (Union Brief at 48), it is self evident that residence is no indicia of an individual's availability to work in the Union's jurisdiction.

II. CONCLUSION

For the foregoing reasons, the decision of the District Court denying back pay should be reversed.

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Respectfully submitted,

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